UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

TINA B. BOYD,	)	
Complainant	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	Case No. 96B00047
	)	
AMZI R. SHERLING, D.D.S.,	)	
Respondent	).	

DECISION AND ORDER TO DISMISS AND TO DENY APPROVAL TO AGREED VOLUNTARY DISMISSAL
(February 25, 1997)

MARVIN H. MORSE, Administrative Law Judge

Appearances: **John B. Kotmair, Jr., on behalf of Complainant**
Wendell H. Cook, Jr., on behalf of Respondent

I. Procedural History

The chain of events leading to administrative adjudication of this case began on July 9, 1995. On that day Dr. Amzi Sherling, D.D.S., P.A. (Sherling or Respondent), having hired Tina B. Boyd (Boyd or Complainant) on May 29, 1995, through his agent, Eileen Sherling, requested that Boyd complete Department of the Treasury, Internal Revenue Service Form W-4, "Employee's Withholding Allowance Certificate."[1] Boyd's refusal to complete IRS Form W-4; refusal to provide a social security number (an individual taxpayer's identification number for U.S. citizens and residents under 26 C.F.R. § 301.6109-1(a)(1)(ii)(D), (b)(2), (d) (1997)); insistence that as a native-born U.S. citizen she is exempt from taxation, and insistence that her employer accept an improvised document instead of the information requested by IRS Form W-4, are the

[1]A taxpayer's obligation to complete IRS Form W-4 properly has been litigated extensively. See e.g., Cheek v. United States, 498 U.S. 192, 194 (1991) (taxpayer who indicated on the Form W-4 that he was exempt from federal income tax prosecuted for attempted evasion of income tax and failure to file income tax returns). Because employers ***must*** withhold taxes from employee wages under 26 U.S.C.A. § 3402(a), they are immunized from suit by 26 U.S.C.A. § 3403 (an "employer shall not be liable to any person)," and by the Anti-Injunction Act, 26 U.S.C.A. § 7421(a), (prohibiting suit against an employer for withholding taxes). Maxfield v. United States Postal Service, 752 F.2d 433, 434 (9th Cir. 1984).

factual predicates upon which she alleges immigration-based employment discrimination.

The United States Court of Appeals for the Fifth Circuit has described the seemingly innocuous but to some incendiary Form W-4 as:

> an Internal Revenue Service form prepared by the taxpayer and submitted to the employer. From the information provided by the taxpayer, the employer determines how much of the taxpayer's income should be withheld for taxes.

United States v. Doyle, 956 F.2d 73, 74 n.2, 75 (5th Cir. 1992) (noting that "purposeful failure to file an accurate W-4 form could be viewed by the jury as an affirmative willful act to support the violation of 26 U.S.C. § 7201," quoting United States v. Connor, 898 F.2d 942, 945 (3d Cir., 1990), cert. denied, 497 U.S. 1029 (1990)).

An employer ***must*** withhold taxes from an employee's wages by means of IRS Form W-4 and ensure that the employee completes the form. 26 C.F.R. §§ 31.3402(f)(5)-1, 31.3403(a)-1; 26 C.F.R. § 301.6361-1. Maxfield v. United Postal Service, 752 F.2d 433, 439 (9th Cir. 1984) ("employer has no discretion but to follow IRS directives . . . immune from liability to the employee, since the duty to withhold is mandatory, rather than discretionary, in nature").

IRS Form W-4 requires the employee to provide certain information, including name, social security number (an individual's taxpayer identification number), address, marital status, and number of exemptions claimed. 26 C.F.R. §§ 301.6109-1(a)(ii), 301.6361-1. The only exemption from tax withholding is afforded a taxpayer who satisfies both of two criteria specified on Form W-4: (1) the taxpayer must have a right to a Federal income tax refund because of no tax liability in the preceding year, and (2) the taxpayer must have the expectation of a refund because of no tax liability in the current year. IRS Form W-4.

Boyd refused to complete Form W-4 and was discharged by Sherling.

On October 12, 1995, Boyd filed a nine-page charging letter dated September 30, 1995 with the Department of Justice, Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC). Boyd argued that by insisting that she complete IRS Form W-4, and by subsequently firing her for refusing to do so, Sherling discriminated against her on the basis that as a United States citizen she was treated as an alien.

Boyd argued that U.S. citizens are exempt from tax withholding under the Internal Revenue Code because only aliens are required to have Social Security numbers and are, therefore, the only individuals subject to tax withholding. While not claiming that Sherling discriminated against her on a religious basis, Boyd nevertheless asserted that Sherling refused to "reasonably accommodate" her apparently secular beliefs regarding government tax and social security policy. Boyd insisted that an employer's obligation to withhold taxes from an employee's paycheck must give way to the employee's assertion of a philosophical objection to such

withholding.

Specifically, Boyd alleged that:

> On July 9th, 1995 . . . Eileen Sherling . . . presented to me a W-4 and insisted that I fill it out, which requires a social security number. I did not submit this document as I no longer recognize any relationship to a social security number.
>
> It was additionally communicated to . . . Sherling . . . that I do not recognize any social security number in relationship to me as I have executed an Affidavit of Revocation and Rescission of my signature on the SS-5 Application for a Social Security Account Number Card, since there is not law that requires a U.S. Citizen to apply for or possess such a number. Title 42, section 405(c)(2)(B) does not include any requirement to assign numbers to U.S. Citizens, unless they make voluntary application.
>
> * * *
>
> With my position on the number stated, I explained that I was not subject to Subtitle C of the Internal Revenue Code (IRC), as this Subtitle implements the collection process of the taxes imposed by the Social Security Act upon those that possess and have made lawfully valid applications for social security numbers.
>
> * * *
>
> My complaint is that Amzi Sherling, DDS discriminated against me based upon my "national origin." He refused to reasonably accommodate my rights under the law by recklessly disregarding my rights as a Citizen of the United States of America. This was effectuated by Amzi Sherling, DDS's insistence that I allow myself to be treated as a non-resident alien and give up my rights to the full fruit of my labor . . . or I could not work for him.
>
> * * *
>
> It is my desire at this time to file a charge of unfair immigration-related employment practice [sic] against Amzi Sherling, DDS for discriminating against me due to the characteristics and traits of my national origin, and that I would not allow Dr. Sherling, DDS to treat me as a non-resident alien.

By transmittal dated December 16, 1995, John B. Kotmair, Jr. (Kotmair), as "the authorized representative of the injured party," augmented Boyd's September 30, 1995 OSC charging letter by filing a National Worker's Rights Committee adaptation of the standard OSC Charge Form, which was assigned OSC Charge Number, 41-2. At ¶ 3, Kotmair stated that Sherling had "less than 15 employees, but more than 3."

At ¶ 9, Kotmair described the alleged discriminatory Unfair Employment Practice:

> Ms. Boyd submitted a Statement of Citizenship[2] to her employer, Amzi Sherling, DDS, wherein she claimed not to be subject to the withholding of income taxes, since she is a citizen of the U.S. . . . [T]he withholding of income taxes is only imposed upon non-resident aliens, pursuant to 26 USC § 1441 . . . Amzi Sherling, DDS, refused to honor this document [and thereby violated Ms. Boyd's rights.] . . . Ms. Boyd also submitted an Affidavit of Constructive notice, in July, . . . since she could not submit a W-4 Form and instead submitted the Statement of Citizenship. . . . [Because the Secretary of the Treasury "did not respond as requested and required" to Ms. Boyd's expressed desire "to no longer be affiliated with Social Security"] Ms. Boyd was now no longer a subject [sic] to the Social Security Act and the social security taxes imposed in Subtitle C of the Internal Revenue Code. . . . Amzi Sherling, DDS refused to honor this document also [and thereby violated 8 U.S.C. § 1324(b)(6) by committing document abuse as defined in 28 C.F.R. § 44.200(a)(3)].

By an undated determination letter addressed to Kotmair as "representative" of Boyd and others, OSC advised that her charge and those of two other listed individuals were without merit:

> The Special Counsel has determined that there is no reasonable cause to believe that these charges state a cause of action of either citizenship status discrimination or national origin [sic] under 8 U.S.C. § 1324b. The Special Counsel has also determined that there is no reasonable cause to believe that they state a cause of action for document abuse under 8 U.S.C. § 1324b(a)(6).

OSC, therefore, declined to file a complaint on Boyd's behalf, but advised her that she might file a complaint directly in the Office of the Chief Administrative Hearing Officer (OCAHO) .

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[2]This self-styled "Statement of Citizenship," by which Boyd claimed not to be subject to the withholding of income tax, is not to be confused with INS Forms N-560 or N-561, which are INS certificates of U.S. citizenship, documents suitable for verifying employment eligibility under 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1)(v)(A)(2).

On May 14, 1996, Kotmair filed a Complaint for Boyd pursuant to 8 U.S.C. § 1324b. The Complaint was accompanied by a notarized "Privacy Act Release Form and Power of Attorney" dated December 6, 1995, which designated Kotmair and designees as her investigator apropos "the withholding of taxes (including but not limited to a Statement of Citizenship)," restricted to Dr. Sherling and the IRS "extra legem [?]." The obvious inadequacy of that power of attorney to provide representation before an administrative law judge (ALJ) is cured by a August 26, 1996 filing by Kotmair of a Notice of Appearance supported by an August 14, 1996 power of attorney by Boyd of sufficient breadth and specificity to authorize Kotmair to act as Boyd's representative. See OCAHO Rules of Practice and Procedure for Administrative Hearings at 28 C.F.R. § 68.33(b)(6) (1996); see also Horne v. Hampstead, 6 OCAHO 884, at 4-5 (1996).

The May 14, 1996 Complaint, signed by Kotmair, on OCAHO's complaint format comprises entries in response to inquiries at sequentially numbered paragraphs. Considered together, Boyd's responses to questions at ¶¶ 14, 16, and 17 characterize as discriminatory and abusive Sherling's refusal to accept a "Statement of Citizenship" "asserting her rights as a U.S. Citizen not to be treated as an Alien for any reason or practice;" refusal to give credence to an "Affidavit of Constructive Notice" exempting Boyd from providing a Social Security Number and from tax withholding; insistence that Boyd provide a Social Security Number; and discharge "[f]or the reason of not having a Social Security Number, which subsequently made her a U.S. citizen who was not subject to the Internal Revenue Code."

The Complainant, however, declines to state that "other workers in . . . [Boyd's] situation of different nationalities or citizenship were not fired" because, as Kotmair explains, there "were no others in her situation." Complaint at ¶ 14(e). The Complainant requests back pay from July 26, 1995.

OCAHO issued a Notice of Hearing (NOH) on June 12, 1996.

On July 12, 1996, Wendell H. Cook, Jr., Esq., of Wells Marble & Hurst, PLLC, entered a Notice of Appearance as Sherling's representative, and Respondent filed his Answer. The Answer asserted the following defenses, *inter alia*: failure to state a claim upon which relief can be granted; the forum's lack of personam and subject matter jurisdiction; denial that Respondent discriminated against Complainant; Boyd's insubordination, evidenced by her "refusal to disclose her social security number and sign a W-4 form as required by federal law," and "to provide information or execute documents required by her employer;" lack of standing of natural-born citizens to sue under 8 U.S.C. § 1324b; and Mississippi at-will employment law, under which Complainant, an at-will employee, was lawfully terminated. Sherling denied he refused Boyd's documents. Sherling requested dismissal with prejudice, attorneys' fees, and expenses.

On December 9, 1996, by letter dated November 22, 1996, Respondent's counsel informed the Administrative Law Judge (ALJ) that "the parties have agreed to settle this case among themselves, pending the execution of a Release, and the approval and entry of an Order of Dismissal with Prejudice by the Court." On January 3, 1997, Respondent's counsel by letter

dated December 18, 1996, transmitted to the ALJ an unexecuted copy of the "Release reflecting the settlement agreement." The unexecuted release, while denying Sherling's liability, nevertheless agrees to pay Boyd $2,110.20 in return for relinquishment of any claims, past, present, or future,

> against Amzi R. Sherling, Individually, or as Amzi R. Sherling, D.D.S., P.A. . . . which arise from or pertain in any manner to Boyd's employment at Amzi R. Sherling, D.D.S., no matter how styled or classified, or which were asserted, or which could have been asserted in . . . OCAHO Case No. 96-B00047.

No executed agreement has been filed. Presumably, implementation awaits approval by the judge of the agreed disposition between the parties. For the reasons explained in this Decision and Order I am unable to approve that result.

II. Discussion and Findings

A. A Forum Will Dismiss a Case *Sua Sponte* for Lack of Subject Matter Jurisdiction

The Supreme Court has instructed that federal ALJs are "functionally comparable" to Article III judges. Butz v. Economou, 438 U.S. 478, 513 (1978). To the extent that reviewing courts characterize the Article III trial bench as a court of limited jurisdiction, the ALJ is *a fortiori* a judge of limited jurisdiction subject to identical jurisdictional strictures. Winkler v. Timlin, 6 OCAHO 912, at 4 (1997); Horne v. Town of Hampstead, 6 OCAHO 906, at 5 (1997).

"Subject matter jurisdiction deals with the power of the court to hear the plaintiff's claims in the first place, and therefore imposes upon courts an affirmative obligation to ensure that they are acting within the scope of their jurisdictional power." 5A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1350 (2d ed. Supp. 1995).

The party asserting subject matter jurisdiction bears the burden of proving it.

> [T]he rule is well settled that the party seeking to invoke the jurisdiction of a federal court must demonstrate that the case is within the competence of that court. The presumption is that a federal court lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over subject matter exists. Thus the facts showing the existence of jurisdiction must be affirmatively alleged in the complaint.

Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1177 (5th Cir. 1984) (quoting Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 3422 at 45).

A forum's first duty is to determine subject matter jurisdiction because "lower federal

courts are courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376 (1940); see also United States v. Garner, 749 F.2d 281, 284 (5th Cir. 1985). "Federal courts are courts of limited jurisdiction by origin and continuing congressional design. The rules of jurisdiction, which occasionally may appear technical and counterintuitive, are to be ungrudgingly obeyed." Beers v. North American Van Lines, Inc., 836 F.2d 910, 913 (5th Cir. 1988). The federal forum may *sua sponte* determine subject matter jurisdiction. Johnston v. United States of America, 85 F.3d 217, 218 n.2 (5th Cir. 1996); Cinel v. Connick, 15 F.3d 1338, 1341 (5th Cir. 1994), cert. denied, 115 S.Ct. 189 (1994); Garner, 749 F.2d at 284; Christoff v. Bergeron Industries, Inc., 748 F.2d 297, 298 (5th Cir. 1984). In so doing, the forum is not free to expand or constrict jurisdiction conferred by statute. Willy v. Coastal Corp., 503 U.S. 131, 135 (1992). Nor can "the parties . . . create federal subject matter jurisdiction either by agreement or consent." Beers, 836 F.2d at 912. To determine subject matter jurisdiction, the forum must "construe and apply the statute under which . . . asked to act." Chicot, 308 U.S. at 376.

Furthermore, federal forae "are without power to entertain claims otherwise within their jurisdiction if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.'" Hagans v. Lavine, 415 U.S. 528, 536 (1974) (quoting Newburyport Water Co. v. Newburyport, 193 U.S. 561, 579 (1904)). A claim is "plainly unsubstantial" where "obviously without merit" or where "its unsoundness so clearly results from . . . previous decisions . . . as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Hagans, 415 U.S. at 535 (internal quotations omitted) (citing Ex parte Poresky, 290 U.S. 30, 31-31 (1933)). Where, from the face of the complaint there is no reasonably conceivable basis on which relief can be granted, the forum is obliged to confront the failure of subject matter jurisdiction. In such cases, the Complaint should be dismissed. MCI Telecommunications Corp. v. Credits Builders of America, Inc., 980 F.2d 1021, 1022 (5th Cir. 1993), cert. granted and judgment vacated, 508 U.S. 957 (1993), judgment reinstated, 2 F.3d 103 (5th Cir. 1993), cert. denied, 510 U.S. 978 (1993); Cinel, 15 F.3d at 1342.

B. Complainant's Claims of Discrimination on the Bases of Nationality and Citizenship Status and Document Abuse Are Dismissed Because This Forum Lacks Subject Matter Jurisdiction over Challenges to the United States Tax Code and the Social Security Act and over the Terms and Conditions of Employment and for Failure to State a Claim Upon Which Relief May Be Granted Under IRCA

1. This Forum Lacks Subject Matter Jurisdiction Over Challenges to the United States Tax Code and the Social Security Act and Over the Terms and Conditions of Employment

Respondent contends in his Answer that this forum lacks subject matter jurisdiction over the Complaint. Fed. R. Civ. P. 12(h)(3) compels dismissal of claims over which a court lacks subject matter jurisdiction:

> Whenever it appears by the suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Fed. R. Civ. P. 12(h)(3); Jefferson Fourteenth Associates v. Wometco de Puerto Rico, 695 F.2d 524, 525 (11th Cir. 1983) (sua sponte dismissal is appropriate where a court lacks subject matter jurisdiction).

This proceeding stems from what can best be characterized as misapprehension that this forum's jurisdiction is available to resolve disputes concerning an employee's philosophic or political disagreement with obligations imposed by federal revenue and social security statutes or regarding employment terms and conditions. Such controversies are beyond reach of 8 U.S.C. § 1324b, enacted by the Immigration Reform and Control Act of 1986 (IRCA), (Pub. L. 99-603), amended by Pub. L. 101-649, 104 Stat. 4978 (Nov. 29, 1990). Complainant is in the wrong forum for the relief she seeks. A congressional enactment to provide a remedy which addresses a particular concern does not become a per se vehicle to address all claims of wrongdoing. This forum is one of limited jurisdiction, powerless to grant the relief Boyd seeks. I am unaware of any theory on which to posit IRCA jurisdiction that turns on requests by an employer for execution of an Internal Revenue Service Form W-4 tax withholding form or a social security number. Boyd's dispute is with the internal revenue and social security prerequisites to employment in this country, not with immigration law.

a. Stringent Statutory Provisions Govern the Manner in Which a Taxpayer May Dispute Tax Withholding

Title 26 U.S.C.A. § 3402(a)(1) obliges "every employer making payments of wages" to deduct and withhold taxes "at the source" -- i.e., the place of employment. The employer's duty to withhold taxes is mandatory. Maxfield v. United States Postal Service, 752 F.2d at 439. The vehicle through which the employer computes withholding tax is IRS Form W-4, the subject of this dispute. Included in the information solicited by Form W-4 is the employee's social security number, which is the taxpayer identifying number for wage-earning individuals. 26 C.F.R. § 301.6109-1(a)(1)(ii). All employees must apply for and furnish a social security number to their employers, whether or not they wish to receive benefits. 26 C.F.R. § 301.6109-1(d). An employee who refuses to sign Form W-4 is still subject to withholding tax. United States v. Drefke, 707 F.2d 978 (8th Cir. 1983), cert. denied, Jameson v. United States, 464 U.S. 942 (1983). An employer who fails to withhold the tax is liable for the tax. 26 U.S.C. § 3403; 26 C.F.R. § 31.3403-1.

To facilitate the process of tax collection and to immunize employers from suits stemming from performance of statutory duties, 26 U.S.C. § 7421(a) prohibits suit for the purpose of restraining tax collection "in any court by any person" who has not followed administrative procedures precedent best summarized as "pay now, sue later."

To resolve philosophical disputes regarding a tax's validity, a taxpayer must follow a statutory procedure which has received the Supreme Court's imprimatur:

> pay the tax, request a refund from the Internal Revenue Service, and, if the refund is denied, litigate the invalidity of the tax in federal district court.

Cheek v. United States, 498 U.S. 192, 206 (1991) (enumerating Congressionally mandated procedures for challenging validity of tax code). See 26 U.S.C. §§ 7422(a), 7422(b) ("No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed . . . until a claim for refund has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof") ("Such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress"); Cohen v. United States, 297 F.2d 760, 772 (9th Cir. 1962), cert. denied, 369 U.S. 865 (1962) (Congress may require taxpayer to pay first and then litigate); Alaska Computer Brokers v. Morton, 1995 WL 653260, at 2 (D. Alaska 1995) (courts consistently reject taxpayer attempts to circumvent the "pay first, litigate later" rule by framing tax contests as collateral attacks).

See also United States v. MacElvain, 858 F.Supp. 1096, 1100 (M.D.Ala. 1994), aff'd, 68 F.3d 486 (11th Cir. 1995) (because the law provides specific statutory procedures to challenge merits of federal tax liability, including filing suit for refund of taxes paid, frivolous self-help measures, including common law liens and complaints against federal officials and contract employees, are null and void); Schultz v. Stark, 554 F. Supp. 1219, 1220 (E.D.Wis. 1983) (suit clearly frivolous and attorneys' fees awarded where, the duty of employers to withhold taxes through Form W-4 being well-settled, members of a religious organization which counseled them not to pay income taxes pressed an action in district court; proper procedure for challenging tax liability is to file for refund with IRS, then sue under § 7422(a) if denied); 13B CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3580 (2d ed.1984) (administrative claim for refund is jurisdictional prerequisite to bringing suit).

"No court is permitted to interfere with the federal government's ability to collect taxes." Intern. Lotto Fund v. Virginia State Lotto Dept., 20 F.3d 589, 591 (4th Cir. 1994). Courts are barred from so doing by 26 U.S.C. § 7421(a), a statute popularly known as "The Anti-Injunction Act." The Anti-Injunction Act states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." 26 U.S.C. § 7421(a).

The purpose of the Anti-Injunction Act is to protect "the Government's need to assess and collect taxes as expeditiously as possible with a minimum of judicial interference." Bob Jones Univ. v. Simon, 416 U.S. 725, 736 (1974). The Anti-Injunction Act embodies "Congress' long-standing policy against premature interference with the determination, assessment, and collection of taxes." Jericho Painting & Special Coating, Inc. v. Richardson, 838 F.Supp. 626, 629 (D.D.C. 1993).

The Anti-Injunction Act enjoins suit to restrain activities culminating in tax collection. Linn v. Chivatero, 714 F.2d 1278, 1282, 1286-87 (5th Cir. 1983); Hill v. Mosby, 896 F.Supp. 1004, 1005 (D.Idaho 1995). "Collection of tax" under the Anti-Injunction Act includes tax withholding by employers. United States v. American Friends Serv. Comm., 419 U.S. 7, 10 (1974). Suits to enjoin the collection of the withholding tax are therefore "contrary to the express language of the Anti-Injunction Act." Jericho Painting & Special Coating v. Richardson, 838 F.Supp. at 629.

The Anti-Injunction Act mandates anticipatory withholding of taxes from all potential taxpayers, foreign and domestic, and is not limited to actions initiated after IRS assessments. Intern. Lotto Fund v. Virginia State Lotto, 20 F.3d 589, 592. Even where the taxpayer is a foreign entity, possibly protected by an international treaty, and the collection of the tax may be legally dubious, the Anti-Injunction Act protects the collecting agent from suit. Yamaha Motor Corp., USA v. United States, 779 F.Supp. 610, 612 (D.D.C. 1993).

Where a taxpayer has not followed statutory conditions precedent to suit, courts are deprived of jurisdiction.

> Section 7421(a) of the Internal Revenue Code prohibits suits brought to restrain the assessment or collection of taxes. . . . The . . . contention that [a Complainant] . . . is entitled to a court determination of his tax liability prior to any collection action has been rejected by several courts. See e.g. Kotmair, Jr. v. Gray, 74-2 USTC P 9492 (Md. 1974), aff'd per curiam [74-2 USTC P 9843], 505 F.2d 744 (4th Cir. 1974). The plaintiff has an adequate remedy at law pursuant to the tax refund procedure set forth in Section 7422 of the Internal Revenue Code. . . . In order to contest the merits of a tax . . . a taxpayer may file an administrative claim for a refund after payment of the tax. Internal Revenue Code, § 7422. The administrative claim must be filed and denied prior to filing . . . [an] action in the federal district court. Black v. United States [76 1 USTC P 9383], 534 F.2d 524 (2d Cir. 1976). [Where] the plaintiff failed to meet this jurisdictional prerequisite . . . the [c]ourt is without jurisdiction.

Melechinsky v. Secretary of the Air Force, and Director, Internal Revenue Service, 1983 WL 1609, at 2 (D. Conn. 1983). See also Tien v. Goldberg, 1996 WL 751371, at 2 (2d Cir. 1996); Humphreys v. United States, 62 F.3d 667, 672 (5th Cir. 1995).

There is a judicially-created exception to the Anti-Injunction Act where, viewing facts and law in a light most favorable to the government, the government could not possibly prevail in a collection action, ***if*** the court in which suit is filed appropriately exercises equity jurisdiction over the subject of the suit. Enochs v. Williams Pckg & Nav. Co., 370 U.S. 1, 7 (1962). Boyd v. Sherling is not that case, because Boyd has no judicially cognizable grounds on which to predicate her refusal to have tax withheld.

In the United States Court of Appeals for the Fifth Circuit, the court with appellate jurisdiction over this action, a district court lacks jurisdiction to hear claims that an employer has withheld disputed taxes unless the taxpayer has followed administrative conditions precedent to suit. Zernial v. United States, 714 F.2d 431, 434 n.4 (5th. Cir. 1983) (citing Stonecipher v. Bray, 653 F.2d 398 (9th Cir. 1981), cert. denied, 454 U.S. 1145 (1982)). Those who ignore mandatory procedures precedent to suit, and who persist in frivolously litigating in defiance of the Anti-Injunction Act, have been found liable for costs and damages. Capps v. Eggers, 782 F.2d 1341 (5th Cir. 1986).

Whether through ignorance of the law, mistake, or good faith belief that she is the exception to the rule that all U.S. citizens and residents are liable for taxes, Boyd in filing a § 1324b action circumvents stringent statutory jurisdictional prerequisites to suit and cannot succeed. She did not pay the disputed tax, apply for a refund, or sue in federal district court after being denied.

But, even had Boyd followed the correct procedures, this forum lacks subject matter jurisdiction in tax matters. Boyd seeks to avail herself of this forum of limited jurisdiction in lieu of tax court or federal district court, appropriate fora to hear tax matters. See 28 U.S.C. § 1346(a)(i) ("district court shall have original jurisdiction . . . of any civil action against the United States for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed"). This forum, reserved for those "adversely affected directly by an unfair ***immigration-related*** employment practice," is powerless to hear tax causes of action, whether or not clothed in immigration guise. 28 C.F.R. § 44.300(a) (1996).

Not only has Boyd chosen the wrong forum in which to bring a tax complaint, she has elected to sue the wrong party. She charges not the United States, the creator and enforcer of the Internal Revenue Code, who consents to suit and waives sovereign immunity where the aggrieved taxpayer has fulfilled mandatory conditions precedent, but her employer, who is immune from suit in the performance of his statutory duty to withhold taxes. 26 U.S.C. § 3403 ("The employer . . . shall not be liable to any person" when withholding tax from wages); 26 C.F.R. § 31.3403(a)(1); Maxfield v. United States Postal Service, 752 F.2d at 439.

Even were this forum not limited to causes of action appropriate to § 1324b relief, it is explicitly deprived of subject matter jurisdiction by the Anti-Injunction Act. Boyd fails to transform her sow's ear of a tax challenge into the silk purse of an immigration-related unfair employment practice complaint by describing it as an immigration-related unfair employment practice. This is not an alternative tax tribunal empowered to short cut stringent statutory conditions precedent to suit. Boyd can obtain no relief here by disguising her tax complaint as an immigration-related cause of action; neither can she prevail against the employer as a proxy for the United States.

b. Citizens and Aliens Alike Are Subject to Internal Revenue Code Obligations

All United States citizens and alien residents are required to file tax returns, subject to *de minimis* exceptions. Individuals obliged to file returns specifically include:

(i) A citizen of the United States, whether living at home or abroad;

(ii) A resident of the United States, even though not a citizen thereof, or

(iii) An alien who is a bona fide resident of Puerto Rico during the entire taxable year.

26 C.F.R. § 1.6012-1(a)(i) - (iii). ***Even*** non-resident aliens are subject to tax withholding on income derived from U.S. sources under Internal Revenue Code § 1441(a). Intern. Lotto Fund v. Virginia State Lottery, 20 F.3d at 590.

Employers ***must*** withhold tax from both citizen and alien employees' wages "at the source" through the mechanism of IRS Form W-4. 26 U.S.C. § 3402(a)(1); 26 C.F.R. § § 31.3401(a)-1, 31.3402(b)-1, 31.3402(f)(5)-1(a). An employer who fails to collect the withholding tax is liable. 26 U.S.C. § 3403 ("the employer shall be liable for the payment of the tax required to be deducted and withheld"); 26 C.F.R. § 31.3403-1. To identify the wage-earner, Form W-4 includes a block for the employee's social security number. In the case of an individual wage-earner, the employee's social security number is also his taxpayer identification number. 26 C.F.R. § 301.6109-1(a)(1) (ii). A wage-earner entitled to a "social security number [must use it] for all tax purposes . . . even though . . . a nonresident alien." 26 C.F.R. § 301.6109-1(d)(4).

An individual who provides a statement related to Form W-4 for which there is no reasonable basis "which results in a lesser amount of income tax actually deducted and withheld than is properly allowable" is subject to a civil money penalty of $500. 26 C.F.R. § 31.6682-1 (False Information with Respect to Withholding).

Boyd contests Sherling's mandatory statutory duty to withhold taxes from her wages. Boyd also denies her statutory obligation to pay taxes. Boyd requests that her employer be assessed a monetary penalty for attempting to comply with his statutory obligations. Boyd's request is without legal authority.

To challenge the validity of a withholding tax, employees, whether citizens or resident aliens, must follow stringent statutory procedures precedent. Before suing for a tax withheld, the employee must pay the tax, apply for a refund, and, if denied, sue in federal district court. Cheek v. United States, 498 U.S. at 206. Such procedures precedent do not violate the employee's rights to due process. Cohn v. United States, 339 F.Supp. 168, 169 (E.D.N.Y., 1975). "[T]je right of the United States to exact payment and to relegate the taxpayer to a suit for recovery is paramount." Id.

Title 26 U.S.C. §§ 7421(a), 7422(a), and 7422(b) apply to ***everyone***:

> [N]o suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by *any person* . . . until a claim for refund or credit has been duly filed with the Secretary. . . .
>
> * * *
>
> PROTEST OR DURESS. -- Such suit or proceeding may be maintained whether or not such tax . . . has been paid under protest or duress.

26 U.S.C. §§ 7421(a), 7422(a)(b) (emphasis added).

Non-resident aliens, like U.S. citizens and resident aliens, have long been subject to withholding tax. Commissioner of Internal Revenue v. Wodehouse, 337 U.S. 369, 380, 388 n.11, 391 n.13 (1949); Korfund Co., Inc. v. C.I.R., 1 T.C. 1180 (1943). The Internal Revenue Code mandates that tax be withheld from even non-resident aliens and foreign corporations' income to the extent that their income is derived from U.S. sources. 26 U.S.C. § 1441(a); C.J.S. Internal Revenue §§ 1149, 1151.

Kotmair's characterization of 26 U.S.C. § 1441 in ¶ 9 of the December 16, 1995 OSC supplemental charging form as absolving U.S. citizens of their duty to pay income tax is misleading and inaccurate. Section 1441 does ***not***, as Kotmair states, impose the withholding of taxes ***only*** upon non-resident aliens. Rather, Section 1441 imposes withholding taxes ***even*** on ***non-resident aliens*** whose incomes are derived from U.S. sources. Title 26 C.F.R. § 1.1441-5(a) provides an exemption from nonresident alien tax withholding for U.S. citizens and aliens residing in the United States through the device of a written statement of U.S. citizenship or residency, but it does not relieve U.S. citizens and resident aliens from paying taxes they are obligated to pay, or

from having these taxes withheld from their wages.

By its own terms, 26 C.F.R. § 1.1441-5(a) instructs only with respect to withholding tax on nonresident aliens, foreign corporations and tax-free covenant bonds. Kotmair's argument, based on "Withholding of Tax on Nonresident Aliens," a section of the Code of Federal Regulations completely irrelevant to Boyd, a U.S. citizen and resident of Mississippi, is at best confused.

Because the statutorily delineated procedures for disputing withholding taxes do not involve this forum of limited jurisdiction, Boyd's claim must be dismissed for want of subject matter jurisdiction. This forum of limited jurisdiction is without power to grant relief from the Internal Revenue Code and related sections of the Code of Federal Regulations. It is barred from such exercise both by the limitations inherent in its own mandate and by the Anti-Injunction Act.

c. All Employees, Citizens and Aliens Alike, Must Obtain a Social Security Number and Contribute to Social Security

The constitutionality of the Social Security Act has long been judicially acknowledged. Helvering v. Davis, 301 U.S. 619, 644 (1937); Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 590 (1937). The Supreme Court has held social security's withholding system uniformly applicable, even where an individual chooses not to receive its benefits:

> The tax system imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

United States v. Lee, 455 U.S. 252, 261 (1982) (statutory exemption for self-employed members of religious groups who oppose social security tax available only to the self-employed individual and unavailable to employers or employees, even where religious beliefs are implicated).

> We note here that the statute compels contributions to the system by way of taxes; it does not compel anyone to accept benefits.

Lee, 455 U.S. at 261 n.12.

The Court has found "mandatory participation . . . indispensable to the fiscal vitality of the social security system." Lee, 455 U.S. at 258.

> "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." S.Rep. No. 404, 89th Cong., 1st Sess., pt. 1, p. 116 (1965), U.S. Code Cong. & Admin. News (1965), pp. 1943, 2056. Moreover, a

> comprehensive national security program providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer.

Id. In ¶ 9 of Boyd's adaptation of the OSC charge form, Kotmair argues that one may opt out of social security. The Supreme Court has held otherwise. Although an employee may decline benefits, an employee must submit to deductions. Lee, 455 U.S. at 258, 261 n.12.

Citizens and alien wage-earners alike are obligated to obtain social security numbers (also known as individual "taxpayer identification numbers") and to provide them. 26 C.F.R. § 301.6109-1(a)(1)(ii)(D), (b)(2), (d); 8 U.S.C. §§ 1304(f), 1324(a)(1)(C)(i).

In her September 30, 1995 charging letter to OSC, Boyd stated that she renounced her social security number and that Sherling's refusal to acknowledge her renunciation, evidenced by his insistence that she complete IRS Form W-4, constitutes discriminatory conduct implicating IRCA. The Supreme Court, however, has found "mandatory participation" "indispensable." Lee, 455 U.S. at 258. Furthermore, ***all*** U.S. wage earners must properly complete IRS Form W-4, a lynchpin in the regimen. Cheek, 498 U.S. at 194. Because both citizens and resident aliens must comply, an employer's insistence that an employee complete IRS W-4 does not imply discrimination.

Federal courts have rejected similar arguments, even when couched as free exercise of religion challenges. Hover v. Florida Power & Light Co., Inc., 1994 WL 765369, at 5-6 (S.D.Fla. 1994) (granting summary judgment for employer who declined to create alternative taxpayer identification number for employee who refused to provide social security number, the "mark of the beast," because granting employee's request would violate federal regulations).

In any event, challenges to the Social Security Act and the statutory requisites for its implementation do not properly implicate ALJ jurisdiction under 8 U.S.C. § 1324b.

For the reasons described in II B.1, a - f, Boyd's complaint is dismissed for want of subject matter jurisdiction.

d. The Immigration Reform and Control Act of 1986 (IRCA) Does Not Reach Terms and Conditions of Employment

Section 102 of IRCA, enacted a new antidiscrimination cause of action, amending the Immigration and Nationality Act (INA) by adding Section 274B, codified as 8 U.S.C. § 1324b. Section 102 was enacted as part of comprehensive immigration reform legislation to accompany Section 101, which, codified as 8 U.S.C. § 1324a, forbids an employer from hiring, recruiting, or referring for a fee, any alien unauthorized to work in the United States. Section 1324b was intended to overcome the concern that, as a result of employer sanctions compliance obligations

introduced by § 1324a, people who looked different or spoke differently might be subjected to consequential workplace discrimination.[3]

President Ronald Reagan's formal signing statement observed that "[t]he major purpose of Section 274B is to reduce the possibility that employer sanctions will result in increased national origin and alienage discrimination and to provide a remedy if employer sanctions enforcement does have this result."[4]

As understood by the EEOC (Notice No.-915.011, Responsibilities of the Department of Justice and the EEOC for Immigration-Related Discrimination (Sept. 4, 1987)):

> [c]onsistent with its purpose of prohibiting discrimination resulting from sanctions, [§ 1324b] only covers the practices of hiring, discharging or recruitment or referral for a fee. It does not cover discrimination in wages, promotions, employee benefits or other terms or conditions of employment as does Title VII.

See Tal v. M. L. Energia, Inc., 4 OCAHO 705, at 14 (1994) (holding § 1324b relief limited to "hiring, firing, recruitment or referral for a fee, retaliation and document abuse").

Among the terms and conditions of employment that an employer may legitimately and nondiscriminatorily impose is the requirement that the employee provide a social security number. Toussaint v. Tekwood Associates, 6 OCAHO 892, at 16-17 (1996). "Nothing in the logic, text, or legislative history of the Immigration Reform and Control Act limits an employer's ability to require a social security number as a precondition of employment." Lewis v. McDonald's Corp., 2 OCAHO 383, at 4 (1991). See also Winkler v. Timlin, 6 OCAHO 912, at 11-12 (1997).

Furthermore, as Respondent contends, Mississippi is a state in which the "terminability at will" employment doctrine still holds sway. This doctrine gives an employer a relatively free hand in imposing terms and conditions of employment.

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[3]See "Joint Explanatory Statement of the Committee of Conference," Conference Report, IRCA, H.R. Rep. No. 99-1000, 99th Cong., 2d Sess., at 87 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 5840, 5842.

[4]Statement by President Reagan upon signing S. 1200, 22 Weekly Comp. Pres. Docs. 1534, 1536 (Nov. 10, 1986). See Williamson v. Autorama, 1 OCAHO 174, at 1173 (1990), 1990 WL 515872 ("Although a Presidential signing statement falls outside the ambit of traditional legislative history, it is instructive as to the Administration's understanding of a new enactment"). Accord, Kamal-Griffin v. Cahill Gordon & Reindel, 3 OCAHO 568, at 14 n.11 (1993), 1993 WL 557798.

> Mississippi long has adhered to the common law rule of terminability at will, wherein an employment relationship may be terminated at will by either party. . . . Therefore, "either the employer or the employee may have a good reason, a wrong reason, or no reason for terminating the employment contract."

Empiregas, Inc. of Kosciusko v. Bain, 599 So.2d 971, 974 (Miss. 1992) (quoting Kelly v. Mississippi Valley Gas Co., 397 So.2d 874, 875 (Miss. 1981) and citing Perry v. Sears, Roebuck & Co., 508 So.2d 1086, 1088 (Miss. 1987) and Butler v. Smith & Tharpe, 35 Miss. 457, 464 (Miss. 1858)). See also Bobbitt v. Orchard, Ltd., 603 So.2d 356, 360-361 (Miss. 1992).

Under Mississippi common law, an employer may fire an "at-will employee for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." Smith v. Atlas Off-Shore Boat Service, Inc., 653 F.2d 1057, 1060 (5th Cir. 1981) (citing Blades, Employment at Will vs. Individual Freedom, 67 Colum.L.Rev. 1404, 1405 (1967)). See also Watkins v. United Parcel Service, Inc., 797 F.Supp. 1349, 1356, 1358 (S.D. Miss. 1992), aff'd, 979 F.2d 1535 (5th Cir. 1992); Samples v. Hall of Mississippi, Inc., 673 F.Supp. 1413, 1416 (N.D.Miss. 1987).

Mississippi only recently recognized a public policy exception to the terminability at will doctrine. McArn v. Allied Bruce-Terminex Co., Inc., 626 So.2d 603, 607 n.1 (Miss. 1993). This public policy exception allows damages in tort for (1) an employee who refuses to participate in an illegal act and for (2) an employee who is discharged for reporting an illegal act. Id. at 607. The public policy invoked by the exception must be "clearly defined, and well established," grounded in "legislation, administrative rules, regulations . . . or judicial decisions." Perry v. Sears, Roebuck, Inc., 506 So.2d at 1089. The public policy exception applies only to criminal, not civil, illegalities. Rosamond v. Pennaco Hosiery, Inc., 942 F.Supp. 279, 285 (N.D.Miss. 1996).

Boyd cannot invoke the public policy exception to Mississippi's terminability at will doctrine. Boyd cannot argue that she refused to participate in a criminally illegal act, or claim that she was discharged for reporting a criminally illegal act. Her refusal to complete IRS Form W-4 or to provide her social security number implicate no violation of public policies by the employer. To the contrary, her refusal violates statutory, regulatory, and judicially articulated public policy. As a consequence, she cannot avail herself of the public policy exception to Mississippi's terminability at will doctrine.

In Mississippi, insubordination may constitute *per se* grounds for dismissal. Perry v. Sears Roebuck, Inc., 508 So.2d at 1089 (citing Merchant v. Pearl Mun. Sep. School Dist., 492 So.2d 959 (Miss. 1986); Noxubee Co. Bd. of Ed. v. Givens, 481 So.2d 816 (Miss. 1985).

Absent a constitutional or statutory wrong, which Boyd fails to allege, it may be

speculated that no court is empowered to grant her the relief she seeks. Courts have consistently refused to characterize as a constitutional infraction an employer's refusal to accommodate an employee who will not provide a social security number. Hover v. Florida Power & Light, 1994 WL 765369, at 5-6 (S.D.Fla. 1994); Hover v. Florida Power & Light, 1995 WL 91531, at 2, 4 (S.D. Fla. 1995), aff'd, 101 F.3d 708 (11th Cir. 1996) (employee who refused to provide social security number because it was the "mark of the beast" failed to prove discrimination where employer refused to accommodate him; employee's insistence that employer violate federal regulations to accommodate him was unreasonable).

In any event, Sherling committed no wrong when he fired Boyd for refusing to provide a social security number and to complete IRS Form W-4 because nothing in § 1324b reaches terms and conditions of employment, and because a Mississippi employer may insist on any term or condition of employment that does not violate a specific articulated public policy. Boyd, therefore, fails to allege a cause of action cognizable under IRCA.

e. An Employer Only Commits Document Abuse by Requiring an Employee To Provide More or Different Documents Than Those Required by the INS, or by Insisting on Production of a Particular INS-Prescribed Document For Purposes of Form I-9 Employment Eligibility Verification

An employer's refusal to honor documents other than those specified by 8 U.S.C. § 1324a(b)(1)(C) does not constitute discriminatory document abuse, nor does refusal to accept documents presented for other purposes. Lee v. Airtouch Communications, 6 OCAHO 901, at 11-12 (1996).

Section 101 of IRCA, 8 U.S.C. § 1324a, makes it unlawful to hire an individual without verifying her eligibility for employment in the United States. 8 U.S.C. § 1324a(b). To comply with Immigration and Naturalization Service requirements, an employer must check the documentation of all employees hired after November 6, 1986, and must complete INS Form I-9 within a specified date of hire.

The purpose of INS Form I-9, as described in the August 23, 1991 Federal Register,

> is to ensure that only employment-eligible individuals are hired for employment in the United States. The employment verification system is based upon the presentation of documents. Recognizing the possibility of attempts to circumvent the law, and in anticipation of the presentation of fraudulent documents, the Form I-9 was drafted to contain other indicators that allow the Service to monitor compliance. The employee's address, date of birth, and social

> security number are just such indicators. These entries allow the Service to conduct post-inspection records checks to ferret out unauthorized aliens using counterfeit and fraudulent documents.

Control of Employment of Aliens, 56 Fed. Reg. 41,771 (1991) (explaining text to be codified at 8 C.F.R. § 274a).

Accordingly, the § 1324a employment verification scheme provides a comprehensive system, which stipulates categories of documents acceptable to establish identity and work authorization. 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b)(1)(v). Choosing from specific documents in INS prescribed lists, the employee must produce and present documents to establish identity and employment authorization. The ***only*** documents suitable for these purposes are:

> LIST A (Documents that Establish Both Identity and Eligibility): U.S. Passport; ***INS Form N-560 or N-561 (INS certificates of U.S. citizenship)***[5]; INS Form N-550 or N-570; Unexpired foreign passport, with I-551 stamp or attached INS Form I-94; INS Form I-151 or I-551; INS Form I-688; INS Form I-688A; INS Form I-327: INS Form I-571; INS Form I-688B;
>
> LIST B (Documents that Establish Identity): Driver's license or state or outlying possession of the United States photo ID; federal state or local government photo ID; School photo ID; voter registration card; U.S. military card or draft record; military dependent ID; U.S. Coast Guard Merchant Mariner Card; Native American tribal document; Canadian driver's license; and -- for persons under 18 who are unable to present documents listed above, school records or report cards; clinic, doctor or hospital record; or day-care or nursery record.

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[5] These official INS certificates of citizenship, not to be confused with the constructive affidavit Boyd invokes, consist of certificates issued by the INS to individuals who:

> 1) derived U.S. citizenship through parental naturalization;
>
> 2) acquired U.S. citizenship at birth abroad through a U.S. parent or parents; or
>
> 3) acquired citizenship through application by U.S. citizen adoptive parent(s); and

who, pursuant to § 341 of the Act, have applied for a certificate of citizenship. INS Handbook for Employers: Instructions for Completing Form I-9, M-274 (Rev. 11/21/91) N, p. 22.

> LIST C (Documents that Establish Employment Eligibility): U.S. social security card; Form FS-545 or Form DS-1350; original or certified copy of a birth certificate issued by a state, county, municipal authority or outlying possession of the United States bearing an official seal; Native American tribal document; INS Form I-197; INS Form I-179; and an unexpired employment authorization document issued by the INS.

INS Handbook for Employers: Instructions for Completing Form I-9, M-274 (Rev. 11/21/91) N. To satisfy her employment eligibility, an employee can chose ***only*** from among the listed documents. The employee is not free to improvise, nor is the employer free to accept improvisations.

Subject to this limitation, the employee may choose which prescribed documents to submit. When reviewing the employee's submissions, the employer must accept any prescribed document which appears reasonably genuine on its face. The Immigration Act of 1990 effectively amended § 1324b to clarify that an employer's refusal to accept prescribed documents or demand that the employee submit a particular prescribed document in order to complete the Form I-9 violates IRCA's antidiscrimination provisions. See Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), as amended by The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), P.L. 104-208, 110 Stat. 3009 (Sept. 30, 1996); 8 U.S.C. § 1324b(a)(6).

In sum, § 1324b and the administrative enforcement and adjudication modalities authorized to execute and adjudicate the national policy it evinces are not sufficiently broad to implicate terms and conditions of employment or address attacks on the tax and social security systems. Nothing in Boyd's pleading engages the employment verification system. Where § 1324b has been held available to address national origin and citizenship status discrimination without implicating the I-9 process, the aggrieved individual was found to have been treated ***differently*** from others. United States v. Mesa Airlines, 1 OCAHO 74, at 466-467 (1989), appeal dismissed, Mesa Airlines v. United States, 951 F.2d 1189 (11th Cir. 1991).

"IRCA does not create a blanket prohibition on employer document requests." Toussaint v. Tekwood, 6 OCAHO 892, at 19. See also Zabala Vineyards, 6 OCAHO 830, at 14-15 (1995). Where an employer requests a document, including a social security card, for purposes other than work eligibility verification, the employer is well within his rights. Toussaint v. Tekwood, 6 OCAHO 892, at 19. Sherling did not violate § 1324b by asking Boyd to provide her social security number for the purposes of completing IRS Form W-4; indeed, Sherling was statutorily obligated to so do. Similarly, Sherling was not prohibited by § 1324b from declining Boyd's improvised "Statement of Citizenship." Nothing in § 1324b obliges an employer to accept an alternate document created by the employee. In this case, if Sherling refused to accept it (which the Answer to the Complaint does not concede), he did not violate IRCA.

Sherling requested that Boyd complete IRS Form W-4 and provide her social security

number for the purpose of withholding taxes. Sherling was statutorily obligated to do so. Boyd does not allege that any other employee was treated differently. This is not document abuse under IRCA.

f. The Gravamen of Boyd's Claim Is a Challenge to the Internal Revenue Code and the Social Security Act; Her Complaint Is Therefore Beyond the Reach of This Forum's Limited Subject Matter Jurisdiction

It is established OCAHO jurisprudence that administrative law judges have § 1324b jurisdiction only in those situations where the employee has been ***discriminatorily*** rejected or fired. To similar effect, jurisdiction over document abuse can only be established by proving that the employer requested a particular document from a list of prescribed sources ***for the purpose of satisfying work eligibility*** under § 1324a(b). 8 U.S.C. § 1324b(a)(6).

A complaint of citizenship status and national origin discrimination which fails to allege ***discriminatory*** rejection or discharge is insufficient as a matter of law. Failure to allege a ***discriminatory*** injury compels a finding of lack of subject matter jurisdiction. This is so because the power of the administrative law judge is limited to ***discriminatory*** hiring or discharge and does not embrace the terms of employment. Title 8 U.S.C. § 1324b simply does not reach employment conditions or controversies, and its invocation absent ***discriminatory*** injury cannot confer jurisdiction. Horne v. Town of Hampstead, 6 OCAHO 906, at 5-6 (1997); Naginsky v. Dept. of Defense, et al., 6 OCAHO 891, at 29 (1996) (citing Westendorf v. Brown & Root, Inc., 3 OCAHO 477, at 11 (1993)); Ipina v. Michigan Dept. of Labor, 2 OCAHO 386, at 11-12 (1991); Huang v. Queens Motel, 2 OCAHO 364, at 13 (1991).

In ¶ 14(e) of her Complaint, Boyd acknowledges that Sherling did not retain other employees "of different nationalities or citizenship" who refused to comply with his regimen of withholding tax and social security deductions, but asserts that her protest was unique. Nevertheless, Boyd thereby concedes that Sherling did not discriminate. Boyd's admission that Sherling applied his withholding regimen even-handedly to citizens and aliens alike belies any cognizable claim under IRCA.

Boyd's challenges to the Internal Revenue Code and the Social Security Act do not invite the inference that Respondent discriminated on the basis of citizenship or national origin in firing her. I do not credit Boyd's theory that only non-citizens must produce social security numbers and be amenable to tax withholding. But even were that the law, Boyd's claim is not properly within this forum's jurisdiction. Boyd's contention that as a U.S. citizen she is less amenable to tax withholding or social security practice and procedure than is a non-citizen is immaterial here. As a tribunal of limited jurisdiction, this forum is powerless to respond to allegations that tax and social security compliance is offensive.

In Horne v. Town of Hampstead, 6 OCAHO 906, at 4-5 and in Winkler v. Timlin, 6

OCAHO 912, at 11, the employee's refusal to comply with the employer's adherence to the income tax and social security regimen was held insufficient to state an 8 U.S.C. §1324b cause of action. Like Horne and Winkler, the present dispute between the parties does not implicate the law prohibiting citizenship or national origin discrimination, but instead concerns whether an employee is subject to tax and social security withholding.

Boyd's assertion that Sherling committed document abuse in requesting her social security number and in refusing to accept documents other than those required by the INS as part of the employment eligibility system does not constitute a credible claim of document abuse under IRCA. IRCA does not prohibit an employer from requiring a social security number as a condition of employment. Neither does it require an employer to accept an improvised "Statement of Citizenship" "asserting . . . [a right] as a U.S. Citizen not to be treated as an Alien for any reason or purpose" or to give credence to an "Affidavit of Constructive Notice" regarding exemption from tax and social security obligations, such as those presented by Boyd to Sherling. Complaint at ¶ 17(a). Winkler v. Timlin, 6 OCAHO 912, at 12 (1997); Horne, 6 OCAHO 906, at 8; Toussaint v. Tekwood Associates, Inc., 6 OCAHO 892, at 18-19, 1996 WL 670179, at 13-14; Lewis v. McDonald's Corp., 2 OCAHO 383, at 5.

Boyd admits in ¶ 9 of her OSC Charge that this dispute stems from Sherling's request for a social security number to complete **IRS** Form W-4, a tax withholding document and from Sherling's refusal to accept Boyd's proferred improvised document. Nowhere does she implicate **INS** Form I-9, the INS employment eligibility verification document. Patently, Boyd's disagreement over employee withholding obligations is outside the jurisdictional parameters of 8 U.S.C. § 1324b.

Boyd v. Sherling has everything to do with Boyd's unwillingness to participate in federal income tax and social security withholding and nothing to do with Sherling's obligations under 8 U.S.C. § 1324b. By her own admission, Boyd was neither denied employment nor ***discriminatorily*** discharged. Nor was Boyd asked to produce more or different documents than those prescribed by the INS as part of the I-9 employment eligibility verification system. For these reasons, Boyd's complaint must be dismissed for want of subject matter jurisdiction. Section 1324b relief is unavailable for claims relating to Internal Revenue Code interpretations and Social Security Act challenges.

For the reasons described at II.B.1, a - f, Boyd's claims of discrimination based on national origin and citizenship status and of document abuse are dismissed as beyond the reach of this forum's subject matter jurisdiction.

2. Complainant's Claims of Discrimination Based on National Origin and Citizenship Status and of Document Abuse Are Dismissed for Failure to State a Claim on Which Relief May Be Granted

Under 8 U.S.C.A. § 1324(b)

a. Complainant Fails To State a Claim of Discrimination Based on National Origin

Administrative law judges exercise jurisdiction over national origin claims in unfair immigration-related employment discrimination cases involving employers of four to fourteen employees. 8 U.S.C. § 1324b(a)(2). Where an employer employs fifteen or more employees, national origin claims fall within the jurisdiction of the Equal Employment Opportunity Commission (EEOC). In her charging letter to OSC, Boyd referred to prior EEOC adjudication of the same charge. Boyd stated that the EEOC dismissed her charge for lack of jurisdiction. It may be speculated that EEOC dismissed because Sherling employed less than the requisite number of employees. Boyd's subsequent OSC Charge does not suggest an EEOC filing on the facts of this case. A national origin discrimination complaint dismissed by the EEOC because the employer employed between four and fourteen employees may be adjudicated by an ALJ. Boyd has alleged that Sherling employed "less than 15 employees, but more than 3," a claim not in dispute.

Although Boyd may have properly invoked ALJ jurisdiction over a national origin claim, she fails to state a claim of national origin discrimination. A claim which fails to specify Complainant's national origin is insufficient as a matter of law. Toussaint v. Tekwood, 6 OCAHO 892, at 15. Specifically, Boyd has not identified her national origin. Instead, she repeatedly refers to her national origin as that of a U.S. citizen. Discrimination against United States citizens is addressed separately. 8 U.S.C. § 1324b(a)(1)(B).

Boyd's argument that she was discriminated against on the basis of national origin, volleyed in ¶¶ 14, 16, and 17 of her complaint, is based on Sherling's refusal to accept her "Statement of Citizenship" "asserting her rights as a U.S. citizen not to be treated as an Alien for any reason or practice" and on her attempted revocation of her social security number, "which subsequently made her a U.S. citizen who was not subject to the Internal Revenue Code." These allegations, however, relate only to Boyd's claims of document abuse and citizenship status discrimination. Because by its own terms Boyd's case is based soley on her status as a United States citizen, her claim of national origin discrimination is dismissed for failure to state a claim upon which relief can be granted.

b. Complainant Fails To State a Claim of Discrimination Based on Citizenship Status

It is the complainant's burden to prove citizenship discrimination. Winkler v. Timlin, 6 OCAHO 912, at 8; Toussaint v. Tekwood, 6 OCAHO 892, at 16 ; United States v. Mesa Airlines, 1 OCAHO 462, 500. To state a prima facie case of citizenship discrimination, "a complaint must contain either direct or inferential allegations respecting all material elements necessary to sustain

a recovery under some viable legal theory." Lee v. Airtouch Communications, 6 OCAHO 901, at 10 (citing L.R.L. Properties v. Portage Metro. Hous. Auth., 55 F.3d 1097, 1103 (6th Cir. 1995)). Although well-pleaded allegations of fact are taken as true, legal conclusions and unsupported inferences obtain no deference.

Disparate treatment is the heart of discrimination. For a claim to constitute discrimination "[t]he employer [must] . . . treat some people less favorably than others" because of a protected characteristic. Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). "Where citizenship status is the forbidden criterion, there must . . . be some claim that the individual is being treated less favorably than others because of his citizenship status." Lee v. Airtouch Communications, 6 OCAHO 901, at 10. Where an employer treats all employees in the same way, there can be no discrimination.

In order for Sherling's conduct to have violated 8 U.S.C. § 1324(b)(a)(1)(B), Sherling would need to have treated Boyd ***differently*** from other employers because she was a U.S. citizen. To prevail, Boyd would need to prove that she was accorded ***less favorable treatment than others*** because of her citizenship. Winkler v. Timlin, 6 OCAHO 912, at 8; Westendorf v. Brown & Root, 3 OCAHO 477, at 6-7 (1992).

Boyd claims that she was discriminated against on the basis of her U.S. citizenship when Sherling fired her because she refused to complete IRS Form W-4 and to provide the social security number it requires. Complaint at ¶¶ 14, 16, and 17. Boyd argues that because she negated her social security number, "which subsequently made her a U.S. citizen," she was "not subject to the Internal Revenue Code." Complaint at ¶ 14(b). Boyd states that Sherling fired her when, in lieu of the requisite social security number requested as part of the IRS Form W-4 regimen, she submitted an unofficial, improvised "Statement of Citizenship" "asserting her rights as a U.S. Citizen not to be treated as an Alien for any reason or practice," and because Sherling refused to give credence to an unofficial, improvised "Affidavit of Constructive Notice" exempting Boyd from providing a social security number and from tax withholding. Complaint at ¶¶ 14, 16, and 17. ***Boyd, however, admits that no other workers of different citizenship were retained, thereby negating her claim of discrimination.*** Complaint at ¶ 14(e).

Boyd thereby fails to allege one of two essential elements of a *prima facie* case for discriminatory discharge. Adapted from the framework the Supreme Court established in McDonnell Douglas Corp. v. Greene, 411 U.S. 492 (1973), and elaborated in Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981), a *prima facie* case of discriminatory discharge on the basis of citizenship is established where an employee demonstrates that:

(1) she is a member of a protected class;

(2) she was fired under circumstances giving rise to an inference of unlawful discrimination on the basis of citizenship.

Where the complainant establishes a *prima facie* case, the burden shifts to the employer to assert a legitimate, non-discriminatory reason for its employment decision. St. Mary's Honor Cntr. v. Hicks, 509 U.S. 502, 507 (1993). Where, however, a complainant is unable to present a prima facie case of discrimination, "the inference never arises and the employer has no burden of production." Winkler v. Timlin, 6 OCAHO 912, at 9 (citing Lee v. Airtouch, 6 OCAHO 901, at 11 (citing Mesnick v. Gen. Elec. Co., 950 F.2d 816, 824 (1st. Cir. 1991), cert. denied, 504 U.S. 985 (1992)).

Boyd can satisfy the first, but not the second, of the test's two prongs. As a United States citizen, she is a member of the class protected by 8 U.S.C. § 1324(b). As defined by § 1324b(a)(1)(3), the class of "protected individuals" entitled to benefit from the prohibitions of § 1324b(a)(1)(B) includes U.S. citizens. Boyd cannot, however, satisfy the second prong. Here, in her own submission, she denies discrimination. Nowhere in her complaint does Boyd allege that anyone else, citizen or alien, was treated differently from her.

Characterizing events in a light most favorable to her, Boyd chose not to comply with Sherling's demand that she complete IRS Form W-4, and instead submitted an improvised written statement that she was no longer subject to the Internal Revenue Code. Boyd's tax and social security challenges simply do not invite an inference that Sherling discriminated in firing her. Boyd's theory that only aliens are subject to producing social security numbers and to complying with compulsory tax withholding finds no support in the Internal Revenue Code. Her convoluted inference, based on this doubtful theory, that U.S. citizens should somehow be exempt from taxation, does not support the inference that an employer who fails to favor U.S. citizens similarly situated discriminates against them. Failure to favor a group is not discrimination against it.

Boyd's gripe is not with immigration law. Nothing in IRCA touches on an employee's federal tax withholding obligations. And the call for a social security number in IRS Form W-4 is made by the government.

It follows that under any conceivably reasonable reading of her Complaint, Boyd cannot establish a *prima facie* case of discriminatory discharge on the basis of citizenship. Her Complaint is so insubstantial that its deficiencies cannot be cured by amendment. Accordingly, there can be no genuine issue of material fact such as to warrant a confrontational evidentiary hearing. Therefore there is no call on Sherling to articulate a legitimate, non-discriminatory reason for firing Boyd. It is certain, however, that Boyd's insistence that she be exempted from Sherling's lawful and non-discriminatory regimen of tax withholding compliance would constitute such a reason.

Maximizing opportunities to amend discrimination complaints is generally favored. Because, however, Boyd relies exclusively on Sherling's lawful request that she complete IRS Form W-4 as the gravamen of her discrimination claim, the consequential lack of any discernible meritorious § 1324b claim forecasts that amendment would be futile. Boyd's claim is therefore

dismissed for failure to state a claim cognizable under IRCA.

c. Complainant Fails To State a Claim of Document Abuse

Section 1324b(a)(6) makes it unlawful for employers to demand particular documents from among the Form I-9 catalogue of documents specified for satisfying the employment eligibility verification obligations. Winkler v. Timlin, 6 OCAHO 912, at 10; Westendorf, 3 OCAHO 477, at 10; Lewis v. McDonald's Corp., 3 OCAHO 383, at 5 (1991); United States v. Marcel Watch Corp., 1 OCAHO 143, at 1003 (1990), amended, 1 OCAHO 169, at 1158 (1990). There can be no claim of document abuse where the documents tendered are not documents required for the purpose of ascertaining work eligibility under 8 U.S.C. § 1324a(b). Winkler v. Timlin, 6 OCAHO 912, at 11.

Nowhere does Boyd allege that Sherling requested a social security number to establish her employment eligibility. Instead, Boyd admits that she was already hired and had been working for some time before she was requested to provide a social security number -- not a card -- as part of the process of completing IRS Form W-4, the tax withholding form already discussed at immoderate length. IRS Form W-4 has nothing to do with the immigration-related employment practices reviewed by OCAHO administrative law judges. On its face, Boyd's complaint demonstrates an effort to manipulate the § 1324b prohibition against document abuse by cloaking a challenge to Internal Revenue Code and Social Security Act compliance in an unrelated cause of action against her employer. Even had Sherling requested Boyd's number to ascertain her employment eligibility "there is no suggestion in IRCA's text or legislative history that an employer may not require a social security number as a precondition of employment." Westendorf, 3 OCAHO 477, at 10. "OCAHO case law correctly holds that nothing in the logic, text or legislative history of the Immigration Reform and Control Act [IRCA] limits an employer's ability to require a Social Security number as a precondition of employment." Winkler v. Timlin, 6 OCAHO 912, at 11 (citing Toussaint, 6 OCAHO 892, at 17 (citing Lewis v. McDonald's, 2 OCAHO 383, at 4)). Here, Boyd's social security number was neither requested to verify her employment eligibity nor requested in a discriminatory way.

Furthermore, Boyd had no discernible legal right to press upon Sherling her dubious documents. Even assuming the facts in a light most favorable to Boyd, nothing even vaguely related to the statutorily prescibed document abuse took place here because the documents she presented were not those "required under" 8 U.S.C. § 1324a(b). Because Boyd's documents are in derogation of the list stipulated on Form I-9 which the Attorney General has prescribed for § 1324a(b) compliance, Boyd fails to state a cause of action for breach by Sherling under § 1324b(a)(6). See Horne v. Town of Hampstead, 6 OCAHO 906, at 8-9. Boyd's claim of document abuse is therefore dismissed for failure to state a claim upon which relief can be granted.

C. Approval of Voluntary Settlement Denied

Title 28 C.F.R. § 68.14(a) provides that parties to a complaint who have entered into a proposed settlement agreement shall submit to the presiding ALJ the agreement containing consent findings and a proposed decision and order. 28 C.F.R. § 68.14(a)(1). Alternatively, the parties may notify the ALJ that they have reached a settlement and agreed to a dismissal, subject to the approval of the ALJ. 28 C.F.R. § 68.14(a)(2).

On December 9, 1996, by letter dated November 22, 1996, Respondent reported that the parties had agreed to settle the case among themselves, pending the execution of a release, and the approval and entry of an Order of Dismissal with Prejudice by the Court. On January 3, 1997, by letter dated December 18, 1996, Respondent transmitted to the Court drafts of a proposed Order of Dismissal, and a copy of the Release reflecting the settlement agreement, as yet unsigned. Under its terms, the draft Release reflects that Sherling offered to pay Boyd a sum of $2,110.20 in return for relinquishment of this action and as settlement of all claims against him.

Title 28 C.F.R. § 68.1 provides that for situations not covered by 28 C.F.R. Part 68, the Rules of Civil Procedure for the United States District Courts are available as guidelines. Accordingly, it is necessary and appropriate to apply Fed. R. Civ. P. 41(a)(2). Voluntary dismissals under Rule 41(a)(2) are within a forum's sound discretion. Where a complaint fails to state a claim cognizable in the forum where it is brought, the judge has the authority to deny approval of a related settlement sua sponte and to dismiss the claim. Hermann v. Meridian Mort. Corp., 901 F.Supp. 915, 924 (E.D. Penn. 1995). Given this forum's jurisdictional inability to entertain Boyd's § 1324b claims, I am unable to approve any voluntary settlement.

Recent OCAHO cases deal with the types of claims Boyd alleges. All were dismissed. See Winkler v. Timlin, 6 OCAHO 912, at 14; Horne v. Hampstead, 6 OCAHO 906; Lee v. Airtouch Communications, 6 OCAHO 901, at 13-14; Toussaint v. Tekwood, 6 OCAHO 892, at 21-23, 1996 WL 670179, at 17-18. As early as 1991, related issues were addressed extensively in Lewis v. McDonald's, 3 OCAHO 383, at 5, 1991 WL 5328895, at 3.

In light of unanimous OCAHO precedent, compelling the conclusion that the obvious infirmities are fatal to the pending claims, it would exceed ALJ jurisdiction to place a judicial imprimatur on an award. Absent subject matter jurisdiction over a complaint which fails to state a cause of action on which this forum can grant relief, judicial power is unavailable to approve a settlement which implicitly assumes the employer's liability. A § 1324b claim as insubstantial and lacking in merit as the present one cannot obtain a judicial blessing, whether by concurring in a disposition or otherwise.

III. Conclusion and Order

The national origin claim, citizenship status claim, and document abuse claim are dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under 8 U.S.C. § 1324b.

Approval of the agreed voluntary dismissal is denied.

IV. Appeal

This Decision and Order is the final administrative order in this proceeding, and "shall be final unless appealed" within 60 days to a United States Court of Appeals in accordance with 8 U.S.C. § 1324b(i)(1).

V. Appendices

For convenience, this Decision and Order appends IRS Form W-4, the subject of this dispute, and INS Form N-560, INS certificate of U.S. citizenship, a document suitable for verifying employment eligibility under 8 U.S.C. § 1324a(b).

SO ORDERED.

Dated and entered this 25th day of February, 1997.

_____

Marvin H. Morse
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the attached Decision and Order To Dismiss and To Deny Approval to Agreed Voluntary Dismissal were mailed first class prepaid this 25th day of February, 1997 addressed as follows:

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